2018

Class Action Lawsuits in Pennsylvania: A Comparative Study of Pennsylvania State and Federal Practice

Jason E. Piatt
Duquesne University School of Law, Class of 2018

Class Action Lawsuits in Pennsylvania:

A Comparative Study of Pennsylvania State and Federal Practice

Jason E. Piatt[1]

[1] I offer sincere thanks to Professor Baicker-McKee who selflessly served as faculty mentor for this directed research opportunity.

I. Introduction

In instances when individual claims against a defendant are too small to be economically viable to pursue or when there are too many plaintiffs to be joined in one action despite common issues of law and fact, the solution is a class action lawsuit. In *Eubank v. Pella Corporation*, Judge Posner described their value: "The class action is an ingenious procedural innovation that enables persons who have suffered a wrongful injury, but are too numerous for joinder of their claims alleging the same wrong committed by the same defendant or defendants to be feasible, to obtain relief as a group, a class as it is called. The device is especially important when each claim is too small to justify

the expense of a separate suit, so that without a class action there would be no relief, however meritorious the claims."[2]

This article will compare and contrast class action lawsuits from inception to conclusion in Pennsylvania state and federal courts. First, this article will provide a brief history of the two forms of class actions. Then, this article will discuss class action litigation mechanics. Starting with prerequisites to a class action and class membership, the article will also discuss commencing the action, certification orders, conducting the action, and final resolution of the action.

II. A Brief History of Class Actions

A. In the Courts of England

Prior to the class action, there was a practice of "group litigation" in medieval England from about 1200.[3] These lawsuits involved groups of people either suing or being sued in actions at common law. The groups were typically formed from existing structures in society like villages, towns, parishes, and guilds. Unlike modern courts, medieval courts did not question the right of the named plaintiffs to sue on behalf of a group or the right of a few representatives to defend an entire group.[4]

From approximately 1400 to 1700, group litigation gradually transitioned from being the norm in England to the exception.[5] By 1850, Parliament had enacted several statutes to deal with issues typically faced by certain groups.[6] These statutes removed

[2] 753 F.3d 718, 719 (7th Cir. 2014).
[3] Stephen C. Yeazell, *From Medieval Group Litigation to the Modern Class Action* 38 (1987).
[4] *Id*. at 38-40.
[5] *Id*. at 100.
[6] *Id*. at 210-12.

the impetus for most types of group litigation; it went into a steep decline and was essentially dead in England after 1850.[7]

B. Class actions in the United States

The first class action rule in the United States was in the Federal Equity Rules, specifically Equity Rule 48, promulgated in 1842:

> Where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit properly before it. But in such cases the decree shall be without prejudice to the rights and claims of all the absent parties.[8]

This allowed for representative suits in situations where there were too many parties to proceed individually (which now forms the first requirement for class action litigation, numerosity).[9] However, this rule did not allow these suits to bind similarly situated absent parties, which rendered the rule ineffective.[10] Within ten years, the Supreme Court interpreted Rule 48 in such a way so that it could apply to absent parties under certain circumstances, but only by ignoring the plain meaning of the rule.[11]

Rule 23 of the Federal Rules of Civil Procedure[12] created the modern class action.

---

[7] *Id*.
[8] *Id*. (referencing The New Federal Equity Rules Promulgated by the United States Supreme Court at the October Term, 1912: Together with the Cognate Statutory Provisions and Former Equity Rules; with an Introduction, Annotations and Forms, p. 52).
[9] Deborah R. Hensler, Nicholas M. Pace, Bonita Dombey-Moore, Beth Giddens, Jennifer Gross, Erik K. Moller, *Class Action Dilemmas: Pursuing Public Goals for Private Gain* (Santa Monica: RAND, 2000), 10–11.
[10] *Yeazell at 221.*
[11] *Id*. at 221-22.
[12] For convenience, Rule 23 of the Federal Rules of Civil Procedure will hereafter be referred to as Rule 23.

C. Class Actions in Pennsylvania

Pennsylvania class actions were initially governed by Rule 2230 of the Pennsylvania Rules of Civil Procedure.[13] However, in 1973, the United States Supreme Court decided *Zahn v. International Paper*[14], which required that each plaintiff (not just the named representatives) in a federal class action must meet the jurisdictional amount in order to sustain the suit under diversity jurisdiction. As a result of *Zahn* and because state courts would consequently handle more class actions, Pennsylvania adopted a set of rules governing class actions in 1977.[15] These rules are a compilation of parts of Rule 23 governing class actions, parts of the Uniform Class Action Act, and some provisions not seen in either place.

III. Class Action Mechanics in Pennsylvania State and Federal Courts

A. Prerequisites to Class Action Generally

1. Federal Class Actions

Rules 23(a) and (b) govern the requirements for class certification. Rule 23(a) sets forth four threshold requirements for class certification, each of which must be met: (1) the class is so numerous that joinder of class members is impracticable (numerosity); (2) there are questions of law or fact common to the class (commonality); (3) the claims or defenses of the class representatives are typical of those of the class (typicality); and (4) the class representatives will fairly and adequately protect the interests of the class

[13] Hereafter, Pennsylvania Rules will be referred to simply as their four digit rule number, *e.g.* Rule 2230.

[14] 414 U.S. 291 (1973).

[15] Pa. R. Civ. P. 1701-1716 (former Rule 2230 now repealed).

(adequacy).[16] Rule 23(b) governs the categories of allowed class actions. In order to be certified, the action must fall into one of these categories: a risk of incompatible duties for the class opponent, present a risk of practical impairment on nonparties' interests, constitute a class seeking injunctive or declaratory relief, or predominantly cover common legal or factual questions between class members.[17]

2. Class Actions in Pennsylvania State Court

Pennsylvania Rules 1702(1), (2), and (3) mirror Rules 23(a)(1), (2), and (3) on numerosity, commonality, and typicality. Pennsylvania Rule 1702(4) on adequacy incorporates criteria set forth in a separate rule, Pennsylvania Rule 1709, which sets forth a standard for adequacy of representation that is substantively similar to Rule 23(a)(4).

In Pennsylvania, as in federal practice, there are four prerequisites for a class action; when these are met, one or more members of the class may bring the action as representatives of the class. The prerequsites in Pennsylvania state court mirror those of federal court. There is an additional requirement in Pennsylvania state court not found in the federal courts: the class action must provide for a fair and efficient method of adjudication of the suit as provided for under Rule 1708.[18] For a class action to be considered for certification, all of these prerequisites must be met. As in federal court, Pennsylvania courts have held that the parties seeking certification of a class action have

[16] Fed. R. Civ. P. 23 (a).

[17] Fed. R. Civ. P. 23 (b).

[18] *Pa. R.C.P. 1702(1)–(5)*; *See Basile v. H & R Block, Inc.,* 729 A.2d 574 (Pa. Super. Ct. 1999) (thorough discussion of class action prerequisites and dismissal of one class representative for being a former employee of law firm representing the class); *Hayes v. Motorists Mut. Ins. Co.,* 537 A.2d 330 (Pa. Super. Ct. 1987). *Basile v. H & R Block, Inc.*, 52 A.3d 1202 (Pa. 2012)(Holding that class action lawsuit against a tax preparation company was properly decertified because a necessary element of the plaintiffs' proof - the presence of a confidential relationship - was not amenable to class treatment).

the burden of proving the existence of the prerequisites.[19] The class proponent must establish the underlying facts from which the court can conclude that the class certification requirements and criteria are met.[20]

Pennsylvania courts will also consider several additional factors in determining whether the prerequisites are satisfied. Pennsylvania Rule 1708 lists multiple criteria[21] to determine whether a class action is a fair and efficient method of adjudication based upon the type of recovery contemplated. Pennsylvania Rule 1709 lists three criteria[22] for

---

[19] *Haft v. United States Steel Corp.*, 451 A.2d 445 (Pa. Super. Ct.1982). For denial of class action, *see Cribb v. United Health Clubs, Inc.*, 485 A.2d 1182 (Pa. Super. Ct. 1984).

[20] *Cambanis v. Nationwide Ins. Co.*, 501 A.2d 635 (Pa. Super. Ct. 1985).

[21] In determining whether a class action is a fair and efficient method of adjudicating the controversy, the court shall consider among other matters the criteria set forth in subdivisions (a), (b) and (c).

(a) Where monetary recovery alone is sought, the court shall consider

(1) whether common questions of law or fact predominate over any question affecting only individual members;

(2) the size of the class and the difficulties likely to be encountered in the management of the action as a class action;

(3) whether the prosecution of separate actions by or against individual members of the class would create a risk of

(i) inconsistent or varying adjudications with respect to individual members of the class which would confront the party opposing the class with incompatible standards of conduct;

(ii) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;

(4) the extent and nature of any litigation already commenced by or against members of the class involving any of the same issues;

(5) whether the particular forum is appropriate for the litigation of the claims of the entire class;

(6) whether in view of the complexities of the issues or the expenses of litigation the separate claims of individual class members are insufficient in amount to support separate actions;

(7) whether it is likely that the amount which may be recovered by individual class members will be so small in relation to the expense and effort of administering the action as not to justify a class action.

(b) Where equitable or declaratory relief alone is sought, the court shall consider

(1) the criteria set forth in subsections (1) through (5) of subdivision (a), and

(2) whether the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making final equitable or declaratory relief appropriate with respect to the class.

(c) Where both monetary and other relief is sought, the court shall consider all the criteria in both subdivisions (a) and (b).

[22] In determining whether the representative parties will fairly and adequately assert and protect the interests of the class, the court shall consider among other matters

(1) whether the attorney for the representative parties will adequately represent the interests of the class,

(2) whether the representative parties have a conflict of interest in the maintenance of the class action, and

(3) whether the representative parties have or can acquire adequate financial resources to assure that the interests of the class will not be harmed.

determining whether the representative parties will fairly and adequately represent the class.

There is no Pennsylvania equivalent of Rule 23(b). Instead, the court has discretion to allow or disallow the class based on whether the suit represents a fair and efficient method of adjudication.[23] There is no need to fit into a particular type of class action in Pennsylvania state court.[24]

Class action prerequisites are substantially similar in Pennsylvania state and federal courts, but there are some subtle differences discussed in the following sections.

B. Prerequisite: Numerosity

1. Federal Class Actions

The numerosity requirement of Rule 23 does not focus exclusively on the number of members of the putative class but rather on the impracticality of individual joinder.[25] The courts do not apply a strict numerical test for determining impracticality of joinder. Generally, classes of less than 20 are not considered sufficiently numerous and classes of 40 or more meet the numerosity requirement.[26] Rather than relying only on numbers, courts must examine the facts specific to each case.[27]

---

[23] Pa.R.Civ.P. 1702.

[24] *Id*.

[25] *See*, *e.g.*, *Anderson v. Dep't of Pub. Welfare*, 1 F. Supp. 2d 456, 461 (E.D. Pa. 1998); 1 William Rubenstein, Alba Conte & Herbert B. Newberg, Newberg on Class Actions § 3:3 (4th ed. and Supp. 2010). *See In re Modalifinil Antitrust Litigation*, 837 F.3d 238, 248 (3d. Cir. 2016) (holding that inquiry into impracticability should be particularly rigorous when the putative class consists of fewer than 40 members).

[26] *See Gen. Tel. Co. of the NW. v. EEOC,* 446 U.S. 318, 330 (1980) (suggesting 15 is too few); *Hayes v. Wal-Mart Stores, Incorporated*, 725 F.3d 349, 357 (3d Cir. 2013) (presuming numerosity at 40); *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995) (same). *Clark v. State Farm Mut. Auto. Ins. Co*., 245 F.R.D. 478 (D. Colo. 2007) (rejecting class of 115); *Peoples v. Sebring Capital Corp.*, 209 F.R.D. 428 (N.D. Ill. 2002) (certifying a class of eleven individuals); *Grant v. Sullivan*, 131 F.R.D. 436 (M.D. Pa. 1990) (noting that in some cases, particularly where declaratory and injunctive relief is sought classes as small as fourteen may be certified); *Hernandez v. Alexander*, 152 F.R.D. 192 (D. Nev. 1993) (indicating that a class of fifty-two might meet numerosity requirements but declined to certify because of failure to show "impracticability" of individual joinder).

[27] *Gen. Tel. Co. of the NW. v. EEOC,* 446 U.S. 318, 330 (1980); *Rannis v. Recchia*, 380 F. App'x 646, 651 (9th Cir. 2010); *Stewart v. Abraham*, 275 F.3d 220, 226-27 (3d Cir. 2001); *In re Am. Med. Sys.*, Inc., 75 F.3d 1069, 1079 (6th Cir. 1996); *Robidoux v. Celani*, 987 F.2d 931, 935-36 (2d Cir. 1993);

Although a large number of class members may suffice to prove numerosity, other factors are considered in determining whether joinder is impracticable.[28] These factors include the ease of identifying and finding individual class members, geographical separation, the composition of the class, size of individual claims, individual ability and motivation to bring separate actions, and the nature of the claims raised and relief sought.[29] The courts will not resort to speculation.[30] If the size and impracticality of joinder appear to be a problem in a case, adjusting the class definition may resolve the issue. Examples of this may include eliminating subclasses (each subclass must independently meet the numerosity requirements) or including persons who will be affected in the future.[31]

2. Class Actions in Pennsylvania State Court

The numerosity requirement under the Pennsylvania rules mirrors the Federal rules. A defendant cannot defeat the numerosity requirement by arguing that the plaintiff's inability to identify the total number of class members renders the class definition overbroad.[32] However, numerosity was held not to be established in *Weismer v. Beech-*

---

[28] Charles A. Wright *et al.*, Federal Practice and Procedure § 1762, at 176 (3d ed. 2005 & Supp. 2010);

[29] *See*, e.g., *In re Modalifinil Antitrust Litigation*, 837 F.3d at 252-53 (citing 5 Moore's Federal Practice § 23.22; 5 Newberg on Class Actions § 3.12). *See Evans v. U.S. Pipe & Foundry*, 696 F.2d 925, 930 (11th Cir. 1983); *Sullivan v. Kelly Servs., Inc.*, 268 F.R.D. 356, 362 (N.D. Cal. 2010); *Neese v. Johanns*, 2006 U.S. Dist. LEXIS 25344, at *15, 2006 WL 1169800, at *5 (W.D. Va. May 2, 2006); *Talbott v. GC Servs., Ltd. Pshp.*, 191 F.R.D. 99 (W.D. Va. 2000); *McGlothlin v. Connors*, 142 F.R.D. 626, 632 (W.D. Va. 1992).

[30] *Marcus v. BMW of North Am., LLC,* 687 F.3d 583 (3d Cir. 2012); *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1267-68 (11th Cir. 2009); *Golden v. City of Columbus*, 404 F.3d 950, 966 (6th Cir. 2005).

[31] *See e.g.*, *Pederson v. La. State Univ.*, 213 F.3d 858, 868 n.11 (5th Cir. 2000). *Rodriguez v. Hayes*, 591 F.3d 1105, 1118 (9th Cir. 2010)(Holding that such inclusion of future victims does not render the class definition too vague for certification); *Probe v. State Teachers' Ret. Sys.*, 780 F.2d 776, 780 (9th Cir. 1986); *Williams v. City of Antioch*, No. 90, 2010 WL 3632197, at *6, 2010 U.S. Dist. LEXIS 97829, at *21 (N.D. Cal. Sept. 2, 2010).

[32] *Keppley v. School District of Twin Valley*, 866 A.2d 1165 (Pa. Commw. Ct. 2005) (proponent of class need not plead or prove actual number of class members, so long as she can define class with some precision and provide sufficient indicia that more members exist than it would be practicable to join); *Baldassari v. Suburban Cable TV Co. Inc.*, 808 A.2d 184 (Pa. Super. Ct. 2002) (reversing trial court denial of certification of class of cable television subscribers who had been assessed late fees, and pointing out that defendant's administrative difficulties in calculating number of subscribers did not defeat numerosity).

Nut Nutrition Corporation[33] because of an overly broad definition of class. So, an overly broad definition of class can be a valid defense against certification, but is not a perfect defense just because the total number of class members is unknown.

C. Prerequisite: Commonality

1. Federal Class Actions

Plaintiffs' claims generally must share a common question of law or fact.[34] Rule 23 does not require that all questions of law or all questions of fact be common to all class members.[35] In fact, only one question of law or fact must be common to the proposed class.[36] Some factual differences among class members do not defeat commonality.[37] Class actions that seek class-wide injunctive or declaratory relief "by their very nature present common questions of law and fact."[38]

Allegations may be made that the common question of law or fact is tied to systemic violations of law.[39] However, in *Lightfoot v. District of Columbia*, the plaintiff class claimed that the government and its contractor terminated the benefits of disabled city workers without providing them an opportunity to challenge the termination before it occurred. The court decertified the class after receiving summary judgment filings when it concluded the procedural due process violations were the result of different practices

---

[33] 615 A.2d 428, 430-31 (Pa. Super. Ct. 1992) (overly broad definition of class led to failure to satisfy numerosity; while that defect could have been corrected, court also held there was no predominance of common issues).
[34] Fed. R. Civ. P. 23(a)(2); *Wal-Mart Stores,* 131 S. Ct. at 2556; *Baby Neal v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994).
[35] *See, e.g.*, *Wal-Mart Stores*, 131 S. Ct. at 2556; *Parra v. Bashas', Inc.,* 536 F.3d 975 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 1050 (2009); *Thomas v. Albright*, 139 F.3d 227, 236 (D.C. Cir. 1998).
[36] *Wal-Mart Stores*, 131 S. Ct. at 2556. *See Jamie S. v. Milwaukee Public Schools*, 668 F.3d 481, 497 (7th Cir. 2012); *D.G. ex rel. Stricklin v. DeVaughn*, 594 F.3d 1188, 1198 (10th Cir. 2010); *In Re Am. Med. Sys. Inc.*, 75 F.3d at 1080; *Baby Neal*, 43 F.3d at 56; *Lightfoot v. District of Columbia*, 246 F.R.D. 326, 337 (D.D.C. 2007).
[37] *D.G.*, 594 F.3d at 1195; *Lightfoot*, 246 F.R.D. at 337; *Bynum v. District of Columbia*, 214 F.R.D. 27, 32 (D.D.C. 2003).
[38] *Disability Rights Council of Greater Washington v. WMATA*, 239 F.R.D. 9, 26 (D.D.C. 2007) (quoting Wright, *et al.*, *supra* note 34, § 1763.).
[39] *D.G.*, 594 F.3d at 1195; *Lightfoot v. District of Columbia*, No. 01-01484 (D.D.C. Jan. 10, 2011).

which did not uniformly pervade the entire class. The court held that plaintiffs were required to specifically identify a particular policy or custom that both violates due process and is common to the entire class.[40] This meant that the court found a lack of commonality between plaintiffs when resolving the summary judgment motion.

The Supreme Court addressed a commonality issue in the Title VII context in *Wal-Mart Stores v. Dukes*.[41] In *Wal-Mart Stores*, the plaintiffs contended that local managers had substantial discretion over pay and promotion that had a disparate impact on women. This discretion was exercised within a corporate culture of discrimination that Wal-Mart management knew about but did nothing to stop. This common discriminatory practice adversely affected all female employees. The Court took issue with defining commonality at a high level of generality:

> The mere claim by employees of the same company that they have suffered a Title VII injury, or even a disparate-impact Title VII injury, gives no cause to believe that all their claims can productively be litigated at once. Their claims must depend upon a common contention - for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of class wide resolution - which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.[42]

The Court held that the plaintiffs had established the existence of a corporate policy of delegating to local managers decision-making authority over pay and promotions. But, the court also concluded that the delegation did not result in commonality. What was required was a showing that local managers exercised this discretion in a common way. National and regional disparities in pay and promotion

[40] *Lightfoot*, No. 01-01484.
[41] *Wal-Mart Stores v. Dukes*, 131 S. Ct. 2541 (2011).
[42] *Id.* at 2551.

between men and women fell short of that because they failed to show the store-by-store differences. In the end, the plaintiffs failed to demonstrate commonality because they could not point to a specific employment practice that directly affected all women at Wal-Mart.[43]

Commonality may be demonstrated by expert opinion and statistical evidence. However, *Wal-Mart Stores* may have made doing that more difficult. The Court demanded "significant proof" of a policy of discrimination and was quite critical of the plaintiffs' expert who attempted to supply such proof, while expressing a view that such experts must meet the requirements of *Daubert v. Merrell Dow*.[44] Affidavits from class members containing anecdotal evidence of harm may also be used to support commonality.[45] However, the *Wal-Mart* Court found 120 affidavits insufficient because they represented a very small percentage of class members and only a small portion of the national coverage of Wal-Mart stores.[46] If the proposed class definition fails to establish commonality, the court may redefine or limit the class[47] or create subclasses.[48]

2. Class Actions in Pennsylvania State Court

[43] *Id.* at 2551-57.
[44] *Id.* at 2555.
[45] *Id*. at 2556 (Citing *Dukes v. Wal-Mart Stores, Inc.*, 6503 F.3d 571, 611(9th Cir. 2010)(Allowing use of affidavits as declarations by putative class members).
[46] *Id.* at 2556 (Court holds that anecdotes presented cover only 6 states in which Wal-Mart is located with as few as one or two cases in a given state).
[47] Fed. R. Civ. P. 23(c)(4); *See, e.g.*, *Rodriguez v. Hayes*, 591 F.3d 1105, 1123 (9th Cir. 2010); *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 439 (4th Cir. 2003); *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 167 (2d Cir. 2001), *cert. denied*, 535 U.S. 951 (2002).
[48] Fed. R. Civ. P. 23(c)(5). *See e.g.*, *In re Ins. Brokerage Antitrust Litig.,* 579 F.3d 241, 271 (3d Cir. 2009); *McDonough v. Toys "R" Us, Inc.*, 638 F.Supp.2d 461, 473–74 (E.D. Pa. 2009).

Commonality under the Pennsylvania rules mirrors the Federal rules. Commonality means common characteristics of the case at hand. Class certification was granted in *Samuel Bassett v. Kia Motors America, Inc*.,[49] where the claims centered on a uniformly defective braking system in one model yielding common questions of fact. However, in *Zwiercan v. General Motors Corp.*,[50] the court found predominance of common questions lacking where the allegedly unsafe seat design was included in fifty-five automobile models from nine model years and there was no showing that the same seats were in all models.

The need for individualized inquiry into the factual basis of plaintiff's claims typically results in a lack of commonality and no class action being certified. *Basile v. H&R Block, Inc.* is illustrative on this point. In 1999, the Pennsylvania Superior Court reversed the trial court for abuse of discretion in refusing to certify Basile's claims under Pennsylvania's consumer protection law for lack of commonality.[51] The appellate court held that because H&R Block was a fiduciary of the plaintiffs, reliance by the class plaintiffs was implicit and established by operation of law, and therefore did not need to be proven on an individual basis. The Pennsylvania Supreme Court vacated the decision on other grounds[52] and on remand, the Superior Court concluded that there was sufficient evidence to establish the elements of a confidential relationship. If that relationship were successfully demonstrated upon remand to the trial court, then reliance, inherent in a finding of fiduciary duty, would be presumed for purposes of the claims under the Pennsylvania consumer protection

[49] 68 Pa. D & C 4th 270 (C.P. Phila. 2004), *aff'd*, No. 3048 EDA 2005 (Pa. Super. Ct. Oct. 24, 2007), *aff'd*, 34 A.3d 1 (Pa. 2011),
[50] 68 Pa. D. & C. 4th 449 (C.P. Phila. 2004).
[51] 729 A.2d 574 (Pa. Super Ct. 1999).
[52] 761 A.2d 1115 (Pa. 2000),

law.[53] Upon remand, the trial court held that proof of a confidential relationship in those circumstances required individualized inquiry and decertified the class.[54] Despite reversal by the Superior Court, the Supreme Court ultimately held that proof of a confidential relationship required individualized inquiry and that the trial court's decertification order was therefore proper.[55]

D. Prerequisite: Typicality

1. Federal Class Actions

While commonality and typicality "tend to merge,"[56] the commonality requirement focuses on the common thread among all class members, and the typicality requirement focuses on the named representatives. In *General Telephone Company of the Southwest v. Falcon*, the Supreme Court held that the class representative had to "possess the same interest and suffer the same injury as the class members."[57] The typicality requirement centers on "whether the class representative's claims have the same essential

[53] *Basile v. H&R Block, Inc.*, 777 A.2d 95, 107-08 (Pa. Super. Ct. 2001), *appeal denied*, 806 A.2d 857 (Pa. 2002).
[54] 66 Pa. D & C 4th 57 (C.P. Phila. 2004).
[55] *Basile v. H&R Block, Inc.*, 52 A.3d 1202 (Pa. 2012). *See also See Clark v. Pfizer Inc.*, 990 A.2d 17 (Pa. Super. Ct. 2010) (commonality not satisfied due to individual issues of reliance and/or causation); *Wurtzel v. Park Towne Place Associates Limited Partnership*, 2002 WL 31487894 (C.P. Phila. Nov. 5, 2002) (fraud claim certified for class action where reliance could be presumed from fiduciary relationship); *Foultz v. Erie Insurance Exchange*, 2002 WL 452115, *16 (C.P. Phila. March 13, 2002) (certified insurance bad faith claim where insurer's alleged bad faith predicated on common course of conduct); *Cwietniewicz v. Aetna U.S. Health Care, Inc.*, June Term 1998, No. 423 (C.P. Phila. Nov. 7, 2001) (class certified for claims of fraud, *inter alia*, where reliance can be presumed from common material omission); *Parsky v. First Union Corporation*, 51 Pa. D & C. 4th 468 (C.P. Phila. 2001) (certified class claim for breach of fiduciary duty; minor differences in underlying trust documents do not prevent satisfaction of commonality requirement).
[56] *General Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, at 157, n.13 (1982).
[57] *Id.* at 156.

characteristics as those of the putative class. If the claims arise from a similar course of conduct and share the same legal theory, factual differences will not defeat typicality."[58]

Put another way, typicality can be determined by whether there is a sufficient nexus between the claims of the named representatives and those of the class.[59] As with commonality, factual differences do not defeat typicality if the course of conduct and the claims are based on the same legal theory.[60]

However, typicality is not present when a class representative's claim may be challenged by a unique defense and that defense may preoccupy the class representative, potentially placing her interests ahead of those of the class.[61] In addition, typicality generally requires at least one named plaintiff to have claims against each defendant.[62] Otherwise there would be no standing against defendants with no claims against them.[63] There are two exceptions to this principle: when the defendants conspired to harm the class representative and when a class action is preferred over multiple actions.[64]

2. Class Actions in Pennsylvania State Court

Typicality in the Pennsylvania rules mirrors the Federal rules. In Pennsylvania courts, "some scintilla of evidence must be present for there to be a finding of typicality."[65]

---

[58] *Stirman v. Exxon Corp.*, 280 F.3d 554, 562 (5th Cir. 2002); *Stewart v. Abraham*, 275 F.3d 220, 227-28 (3d Cir. 2001) (certifying class challenging city's re-arrest policy). *See also Piazza v. Ebsco Industries Inc.*, 273 F.3d 1341, 1351 (11th Cir. 2001) (strong similarity of legal theories satisfies typicality despite substantial factual differences).
[59] *Prado-Steiman v. Bush*, 221 F.3d 1266, 1278-79 (11th Cir. 2000).
[60] *D.G. ex rel. Stricklin*, 594 F.3d at 1199; *Beck v. Maximus, Inc.*, 457 F.3d 291, 296 (3d Cir. 2004).
[61] *See Brown v. Kelly*, 609 F.3d 467, 480 (2d Cir. 2010).
[62] *See, e.g., In re Franklin Mutual Funds Fee Litigation,* 388 F. Supp. 2d 451, 461 (D.N.J. 2005).
[63] *Id*.
[64] *Payton v. County of Kane*, 308 F.3d 673, 679 (7th Cir. 2002); *La Mar v. H & B Novelty and Loan Co*., 489 F.2d 461 (9th Cir. 1973).
[65] *Lewis v. Bayer AG*, 2004 WL 1146692, *21 (C.P. Phila. Mar. 19, 2004).

Typicality is established when the class representative's claims arise out of the same course of conduct, involve the same legal theories, and do not raise divergent goals or interests.

In *Delaware County v. Mellon Financial Corp.*,[66] the Commonwealth Court reversed a class certification order because the class representative was subject to a "unique defense" that "could become the focus of the entire litigation and divert attention away from the suit as a whole, as well as disadvantage other class members." Typicality was held not to be established in *Eisen v. Independence Blue Cross*,[67] where chiropractic service providers sought class certification for allegedly improper policies and practices of health insurance companies. The Superior Court held that the differential treatment of patients - some being granted and some being denied benefits - made it unclear that the named representatives were consistently denied reimbursement.[68] This analysis is similar to the analysis undertaken in federal court.

E. Prerequisite: Adequacy of Representation

1. Federal Class Actions

Rule 23 (a)(4) requires that a class representative will represent fairly and adequately represent the interests of absent class members. Due process is the guiding principle when determining the adequacy of representation.[69] By assuring adequacy of

[66] 914 A.2d 469, 476 (Pa. Commw. 2007).
[67] 839 A.2d 369 (Pa. Super. Ct. 2003).
[68] *Id*.
[69] *See* William Rubenstein, Alba Conte & Herbert B. Newberg, Newberg on Class Actions § 1.03 (4th ed. and Supp. 2010)(notice and adequacy of representation are touchstones of due process in class actions). *See also Broussard v. Meineke Disc. Muffler Shops Inc.*, 155 F.3d 331, 338 (4th Cir. 1998) (explaining the class action premise that, because "litigation by representative parties adjudicates basic due process rights of all class members, named plaintiffs must possess undivided loyalty to absent class members").

representation, Rule 23 permits class judgments to bind absent class members.[70] The requirement of adequate representation applies to both the plaintiffs and counsel.

During the inquiry into adequacy of representation, the court first asks whether the named plaintiffs will serve as adequate class representatives. By separating the inquiry into adequacy of representation from the second inquiry of commonality and typicality, the rule requires an assessment of issues on which the named representatives and any part of the class might disagree. Class certification is improper when the interests of the representative party and the class conflict, although they do not need to be identical.[71] In *Anchem Prod. Inc. v. Windsor*, a class was decertified after a finding that the claims of the named representatives were not aligned with those of the other class members. In that case, class members were all exposed to asbestos, but many members suffered injuries completely different than those suffered by other class members, resulting in conflicts between the named plaintiffs and members of the class.[72]

It is possible to avoid conflicts by counsel assessing all interests involved on a regular basis, informing the court of any potential conflicts when they arise, and asking the court to certify subclasses and appoint independent counsel to represent the varying interests in the conflict.[73] In addition, a judge may order notice to all class members

---

[70] *See Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470, 486-87 (5th Cir. 1982)(Explaining *Hansberry v. Lee*, 311 U.S. 32 (1940)).

[71] *Anchem Prod. Inc. v. Windsor*, 521 U.S. 591, 626 (1997).

[72] *Id. See also Schlaud v. Snyder*, 717 F.3d 451, 458 (6th Cir. 2013) (upholding denial of certification of home childcare providers challenging union because proposed class included members who voted for union); *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 480 (5th Cir. 2001) (differences between named plaintiffs and class members render named plaintiffs inadequate only when those differences create conflicts.)

[73] *See, e.g., Diaz v. Romer*, 961 F.2d 1508 (10th Cir. 1992) and cases cited in that opinion (appropriate to certify subclasses due to conflict between those class members who were HIV-positive and those who were HIV-negative). *See also Marisol A. v. Giuliani*, 126 F.3d 372, at 378-79 (2d Cir. 1997) (affirming class certification but suggesting to district court on remand ways to subdivide the class).

informing them of the right to intervene to oppose the named plaintiff's position.[74] In some instances, the court may define the class in a more limited way to avoid conflicts.[75]

In addition to showing a lack of conflict with class members, the named plaintiff must also show a willingness to prosecute the class claims actively. In a case in which the named plaintiff failed to file for class certification for two and a half years, the court found that she failed to protect the interests of the proposed class.[76] Adequate representation by the named plaintiff generally should not include an assessment of plaintiff's financial resources, unless lack of financial resources is relevant to the named plaintiff's willingness or ability to fund the litigation or represent the class.[77]

When evaluating adequate representation of counsel, commitment and competency of counsel are important factors. The zeal and competency of class counsel are initially evaluated based on the experience of the lawyer or the legal organization for whom the lawyer works and the quality of initial pleadings.[78] The court examines the conduct of counsel in the case to date and in other class actions to determine if the representation is adequate.[79] Although an initial determination of counsel's adequacy to

---

[74] *Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470, 487 (5th Cir. 1982) (explaining options open to a district court).

[75] *See*, *e.g.*, *In re Cmty. Bank of N. Va.*, 622 F.3d 275, 304 ((3d Cir. 2010) (remanded the case to the lower court to decide whether, in view of the intra-class conflict, a subclass should be created).

[76] *Rattray v. Woodbury County,* 614 F.3d 831, 836 (8th Cir. 2010); *Monroe v. City of Charlottesville*, 579 F.3d 380, 385 (4th Cir. 2009) (apparent disinterest in case); cert. denied, 130 S. Ct. 1740 (2010); *Harriston v. Chicago Tribune Co.*, 992 F.2d 697, 704 (7th Cir. 1993).

[77] *Horton*, 690 F.2d at 485 n.26.

[78] *Marisol A. v. Giuliani*, 126 F.3d 372, 378 (2d Cir. 1997) (inquiry into whether named plaintiffs will represent potential class with necessary vigor most often described as turning on questions of "whether plaintiffs' counsel are qualified, experienced, and generally able to conduct proposed litigation"). *See also Berger v. Compaq Computer Corp.*, 257 F.3d 475, 479 (5th Cir. 2001) (adequacy requirement mandates inquiry into zeal and competence of representatives' counsel).

[79] *See*, *e.g.*, *Kandel v. Bro. Int'l Corp.*, 264 F.R.D. 630, 634-35 (C.D. Cal. 2010); Armstrong *v. Chi. Park Dist.*, 117 F.R.D. 623, 631-34 (N.D. Ill. 1987) (holding inexperience alone may not be sufficient, but examining mistakes in other class actions as well as the one before in denying certification based on mistakes and inexperience). *See also Creative Montessori Learning Centers v. Ashford Gear LLC*, 662 F.3d 913, 917 (7th Cir. 2011) (vacating order certifying class, holding class counsel was not adequate due to "lack of integrity" of counsel and court's lack of conviction that they would represent interests of class); *Gomez v. St. Vincent Health, Inc.*, 649 F.3d 583, 592 (7th Cir.

represent the class is necessary to certify the class, the court has flexibility to decertify the class later based on evidence of inadequate representation in discovery.[80]

2. Class Actions in Pennsylvania State Court

Adequacy of representation in Pennsylvania class actions mirrors the Federal rules. The court considers whether the attorney for the representative parties will adequately represent the interests of the class, whether the representative parties have a conflict of interest in the maintenance of the class action, and whether the representative parties have or can acquire adequate financial resources to assure that the interests of the class will not be harmed.[81] A lack of funding by the representative plaintiff, without more, is not sufficient to warrant denial of class certification. If an attorney for a class representative ethically advances costs and expenses to the representative, the adequate financing requirement of the certification test is met.[82] If counsel has agreed and is able to advance costs, a representative's own limited financial resources are not determinative of her adequacy.[83] Adequacy may be lacking if the representative lacks the necessary financial resources and produces no evidence of an agreement in place to assist in financing the suit.[84]

2011) (finding lower court did not abuse its discretion in finding proposed class counsel inadequate based on lack of diligence and promptness, faulty discovery efforts, and lack of respect for judicial resources).

[80] *E. Tex. Motor Freight Sys.*, 431 U.S. at 405.

[81] Pa. R. Civ. P. 1709.

[82] *Weinberg v. Sun Co., Inc.*, 740 A.2d 1152, 1171 (Pa. Super. Ct. 1999), *aff'd in part and rev'd in part on other grounds*, 565 Pa. 612, 777 A.2d 442 (2001).

[83] *Janicik v. Prudential Ins. Co. of America*, 451 A.2d 451 (Pa. Super Ct. 1982); *Foultz v. Erie Insurance Exchange*. 2002 WL 452115, *14 (C.P. Phila. March 13, 2002).

[84] *See Keppley v. School District of Twin Valley*, 866 A,2d 1165 (Pa. Commw. Ct. 2005).

Adequacy of representation is not determined solely based on financial adequacy. The adequacy of representation prerequisite was not met when plaintiff's counsel failed to promptly move for class certification within thirty days after the last pleading was due or seek an extension, and counsel admitted he would need additional assistance but did not provide any details about the qualifications of the unknown counsel.[85]

F. Superiority and Predominance versus Fair and Efficient Methods

1. Federal Class Actions

Particular to class actions under Rule 23(b)(3), there is a requirement of common issues of law or fact to predominate (predominance requirement) that requires the proposed class to be superior to other available methods to resolve the dispute (superiority requirement). Rule 23(b)(3) states "questions of law or fact common to class members [must] predominate over any questions affecting only individual members, and that a class action [must be] superior to other available methods for fairly and efficiently adjudicating the controversy." The "and" in subsection (b)(3) means both the predominance and the superiority requirements must be satisfied before the class may be certified.

2. Class Actions in Pennsylvania State Court

The Pennsylvania counterpart to Rule 23(b)(3)'s requirement of predominance and superiority is found in Pennsylvania Rule 1708. That rule incorporates the predominance

[85] *Buynak v. Department of Transportation*, 833 A.2d 1159, 1166 (Pa. Commw. Ct. 2003).

requirement, but not that of superiority. The Pennsylvania Rules do not require that the class action method be "superior" to alternative modes of suit.[86]

Pennsylvania Rule 1708 sets forth separate criteria to be considered by a court depending on whether monetary recovery or equitable or declaratory relief is sought. This requirement is all encompassing, unlike Rule 23(b) which separates causes of action by type. Where monetary recovery alone is sought, the court is to consider seven separate criteria. The first five of these, Pennsylvania Rule 1708(a)(1-5), includes Rule 23(b)(3)'s predominance requirement as well as other requirements identical to those found in Rule 23(b)(1) and (3). However, the sixth and seventh criteria are not found in Rule 23:

> (6) whether in view of the complexities of the issues or the expenses of litigation the separate claims of individual class members are insufficient in amount to support separate actions; and,
>
> (7) whether it is likely that the amount which may be recovered by individual class members will be so small in relation to the expense and effort of administering the action as not to justify a class action.

The seventh criterion was an issue in *Kelly v. County of Allegheny*[87], where the court held that a class action on behalf of over 10,000 public employees was not *de minimus* so as to warrant denial of certification on the ground that the recovery of each member, $13.61, was trivial in relation to the expense and effort of maintaining a class action.[88]

Where equitable or declaratory relief alone is sought, Pennsylvania Rule 1708(b) requires a court to consider the criteria set forth in Pennsylvania Rule 1708(a)(1-5) plus the criterion, identical to Rule 23(b)(2), whether the party opposing the class has acted or

---

[86] *Weinberg v. Sun Company, Inc.*, 740 A.2d 1152, 1163 (Pa. Super. Ct. 1999), *rev'd on other grounds*, 777 A.2d 442 (Pa. 2001).
[87] 546 A.2d 608 (Pa. Super. Ct. 1988).
[88] *Id*.

refused to act on grounds generally applicable to the class, thereby making final equitable or declaratory relief appropriate with respect to the class.[89] Where both monetary and other relief is sought, courts are required to consider all criteria in both subdivisions (a) and (b).[90] The rule does not give any specific weight to the listed criteria nor insist on the exclusivity of the list, so there is an implied discretion for the trial court.[91]

Pennsylvania Rule 1708 requires that a class action must constitute a fair and efficient method of resolving the issues in dispute, but stops short of the federal requirement of superiority.[92] A trial court's decision that recovery was likely to be so small in relation to the expense and effort of administering the action as not to justify class certification was reversed in *Dunn v. Allegheny County Property Assessment Appeals and Review*.[93] The Commonwealth Court pointed out that public policy considerations and the stated purpose of the class action procedure is to permit the aggregation of small claims that would otherwise not be litigated in individual actions.[94] On the other hand, when class members would have substantial claims in individual cases which would be economically feasible to pursue, class certification is not appropriate.[95] Hence, Pennsylvania state courts acknowledge that part of the fair and efficient analysis includes whether plaintiffs will be able to economically bring their individual claims or not.

---

[89] *Dickler v. Shearson Lehman Hutton, Inc.*, 596 A.2d 860 (Pa. Super. Ct. 1991), *appeal denied*, 616 A.2d 984 (Pa. 1992).

[90] Pennsylvania Rule 1708(c).

[91] *Id*.

[92] *Compare* Pa. R. Civ. P. 1708 *and* Fed. R. Civ. P. 23.

[93] 794 A.2d 416, 427 (Pa. Commw. Ct. 2002).

[94] *See also Baldassari v. Suburban Cable TV Co. Inc.*, 808 A.2d 184 (Pa. Super. Ct. 2002) (small recovery of $2.00 per class member, with aggregate potential claim of $1.2 million, warranted certification); *Kelly v. County of Allegheny*, 546 A.2d 608 (Pa. 1988) (trial court abused discretion in denying class certification on ground that average recovery would be $13.61 for each class member).

[95] *Savage Hyundai, Inc. v. North American Warranty Services, Inc*., 60 Pa. D. & C. 4th 156 (C.P. Phila. 2002). *But see Clemente v. Republic First Bank*, 2005 Phila. Ct. Com. Pl. LEXIS 181 at *14 (Phila. C.P. March 18, 2005) (certification proper even though named plaintiffs' damages were approximately $25,000).

Rule 1708(a)(1) requires a court to determine whether common questions predominate over any question affecting only individual members. This requirement was not met in *Keppley v. School District of Twin Valley*,[96] when the court held predominance lacking where each class member would be required to testify concerning their individual expectations of privacy.[97]

Pennsylvania Rule 1708(a)(2)[98] includes manageability as a consideration when determining whether the class action will be fair and efficient. The consideration of potential difficulties in managing a class action is relatively less important in the certification decision of the court compared to other factors and can often be overcome by creative case management within the court's discretion. For example, in *Wurtzel v. Park Towne Place Associates Limited Partnership,* the ability to divide a class into subclasses under Rule 7710(c) eliminated any manageability issues presented where some class members would be confronted by defenses while others would not, since the defenses arose from common documents.[99]

Parsky v. First Union Corporation[100] is another manageability decision. In *Parsky*, a national class of investors brought claims for breach of contract and breach of fiduciary

---

[96] 866 A.2d 1165 (Pa. Commw. Ct. 2005).

[97] *See also Kern v. Lehigh Valley Hospital, Inc.*, 108 A.3d 1281, 1290 (Pa. Super Ct. 2015) (holding that, with respect to Section 201-9.2 of the UTPCPL, trial court did not abuse its discretion in determining "that, under Rule 1702(5), class action would not be a fair and efficient method of adjudication because individual reliance would be the predominant factor over the common issues."); *Eisen v. Independence Blue Cross*, 839 A.2d 369 (Pa. Super. Ct. 2003) (range of insurer reactions to benefit claims created variety of facts and legal claims which could not be covered by one single proceeding); *Green v. Saturn Corp.*, 2001 WL 1807390, *5-7 (Pa. Com. Pl. Oct. 24, 2001) (false advertising and misrepresentation claims would require reviewing reasons of each class member for purchasing vehicle).

[98] Pa. R. Civ. P. 1708(a)(2) (the size of the class and the difficulties likely to be encountered in the management of the action as a class action;).

[99] *Wurtzel v. Park Towne Place Associates Limited Partnership*, 2002 WL 31487894 (C.P. Phila. Nov. 5, 2002). *See also, Tesauro v. The Quigley Corporation*, 2002 WL 372947 (C.P. Phila. Jan. 25, 2002) (potential choice of law issues for national class do not support denying class certification; application of other states' consumer protection laws has no relevancy at certification stage of case) (citing *Janicik v. Prudential Ins. Co. of America*, 451 A.2d 451 (Pa. Super Ct. 1982)).

[100] 51 Pa. D. & C. 4th 468 (C.P. Phila 2001)).

duty arising from alleged tax liabilities as a result of the conversion of common trust funds. In certifying the proposed class, the court held, among other things, that no manageability problems were posed by applying both New Jersey and Pennsylvania law; that there was a high risk of inconsistent decisions; and, that a recovery of less than $50,000 for most class members was low enough to preclude separate actions for each member.[101]

In *Washington v. FedEx Ground Package System, Inc.*, no manageability problems were perceived by the Superior Court when many individuals had opted out and sought to bring their own individual actions. The court held that coordination of the individual cases with the class action for discovery and other efficiency-related purposes was proper.[102]

G. Class Membership

1. Federal Class Actions

The class may be defined or redefined at any time before final judgment.[103] This may occur either following a motion of either party or by the court.[104] Thus, counsel may reevaluate the initially drafted definition as discovery proceeds and the case takes shape.

---

[101] *See also, In re Pennsylvania Baycol Third-Party Payor Litigation*, 2005 WL 852135, *9 (C.P. Phila April 4, 2005) (court will rely on ingenuity and aid of counsel, and upon its plenary authority, to control action to solve whatever management problems the litigation may bring); *Lewis v. Bayer AG*, 2004 WL 1146692, *22 (C.P. Phila Mar. 19, 2004), where the court held that problems of administration alone should not justify denial of an otherwise appropriate class action ("given the prospect of a limited damage award and the expense of proving a medical monitoring claim," court held that a class action was the "only means asymptomatic plaintiffs ha[d] to recover medical monitoring expenses.").

[102] *Washington v. FedEx Ground Package System, Inc.*, 2010 WL 2119570 (Pa. Super. Ct. May 27, 2010).

[103] Fed. R. Civ. P. 23(c)(1)(C).

[104] *See, e.g., Hnot v. Willis Group Holdings*, 241 F.R.D. 204, 207-08 (S.D.N.Y. 2007) (reconsideration of class certification orders justified by intervening events); *Conant v. McCaffrey*, 172 F.R.D. 681, 693-94 (N.D. Cal. 1997) (class redefined by court and recognizing that court can redefine the class at any point in the litigation).

Membership in all three types of class action will either be included in a mandatory fashion or will have an opt-out ability.[105]

The inclusion of class members in a putative class whose individual claims may be subject to affirmative defenses, such as a statute of limitations, does not preclude class certification so long as common issues otherwise predominate.[106] If the injury is continuous, retroactive or prospective relief may be available. The class definition may also include individuals who may be harmed in the future.[107]

2. Class Actions in Pennsylvania State Court

Pennsylvania Rule 1711(a) provides that every member of the class as defined in the court's order is included in the class unless exclusion is requested by a specified date. This differs from the federal procedure which limits opting out to Rule 23(b)(3) actions. The Explanatory Note to the Pennsylvania rule points out that there will be times when self-exclusion should not be permitted, such as where the members of the class have joint, as distinguished from several, interests in the subject matter and their joinder is compulsory. In subsection (b), the rule provides the court with the option to require a true opt-in procedure only in certain limited instances, such as where the individual claims are substantial and the potential members of the class have sufficient resources, experience,

[105] Fed. R. Civ. P. 23(c)(2)(B).
[106] *See, e.g., Smilow v. Sw. Bell Mobile Sys., Inc.*, 323 F.3d 32, 39-40 (1st Cir. 2003).
[107] *See, e.g. J.D. v. Nagin*, 255 F.R.D. 406, 414 (E.D. La. 2009); *Reynolds v. Giuliani*, 118 F. Supp. 2d. 352, 388-89 (S.D.N.Y. 2000). *See also Armstead v. Coler*, 914 F.2d 1464, 1465 (11th Cir. 1990).

and sophistication in business affairs to conduct their own litigation, or under other special circumstances.

H. Commencing the Action

1. Federal Class Actions

Class actions in federal court are commenced with a Class Action complaint. The complaint will describe the events that caused the injury or financial harm suffered by the client. The complaint will also state that the lawsuit seeks to recover compensation for the person filing the suit (sometimes known as the "lead plaintiff") and for all other individuals who suffered the same type of harm.

2. Class Actions in Pennsylvania State Court

In Pennsylvania state courts, a class action is begun by filing a complaint.[108] When this complaint is filed, a judge must be assigned to the case who will oversee all aspects of that class action.[109] Pennsylvania Rules 1703 provides that a class action shall be commenced "only" by the filing of a complaint with the Prothonotary in the form provided by Pennsylvania Rule 1704. So, unlike in federal court, a case commenced as an individual case in state court cannot be amended to become a class action.[110] Pennsylvania Rule 1701 defines a "class action" as an action brought by or against parties as representatives of a class until the court by order refuses to certify it as such or revokes

[108] Pa. R.C.P. 1703(a); *Edward M. v. O'Neill*, 436 A.2d 628 (Pa. Super. Ct. 1981).
[109] Pa. R.C.P. 1703(b).
[110] *Debbs v. Chrysler Corp.*, 810 A.2d 137 (Pa. Super. Ct. 2002) (trial court abused discretion when it permitted plaintiff to amend individual case with class action allegations and new parties).

a prior certification.[111] This principle is treated similarly in federal court for purposes of settlement.[112]

The complaint must include a caption designating the action as a "Class Action."[113] Under a separate heading entitled "Class Action Allegations," declarations of fact that support the prerequisites above must be averred.[114] Courts have required that all the facts which support the plaintiff's class action be pleaded under this separate heading.[115] Like Federal court, state court claims for equitable, declaratory, and monetary relief that arose out of the same action may be joined in the complaint.[116]

Issues of fact involving the class action allegations are raised in the answer instead of preliminary objections.[117]

I. Certification Orders for Class Actions and Notice to Class Members

1. Federal Class Actions

[111] Pa.R.C.P. 1701(a). *See Bell v. Beneficial Consumer Discount Company*, 348 A.2d 734 (Pa. 1975) ("class is in the action until properly excluded"); *Braun v. Wal-Mart Stores, Inc.*, 60 Pa. D&C. 4th 13 (C.P. Phila. 2003) (putative class members entitled to protections of Rules of Professional Conduct and defendant not permitted to conduct ex parte interviews with class members).

[112] *See, e.g., Philips v. Allegheny County*, 869 F.2d 234, 237 (3rd Cir. 1989) ("action filed as class action should be treated as if certification has been granted for the purposes of settlement until certification is denied"); *Kahan v. Rosenstiel*. 424 F.2d 161, 169 (3d Cir. 1970) ("suit brought as a class action should be treated as such for purposes of dismissal or compromise, until there is a full determination that the class action is not proper"); *but see* Fed. R. Civ. P. 23(e) (requiring court approval of settlements only where class has been certified).

[113] Pa. R.C.P. 1704(a).

[114] Pa. R.C.P. 1704(b). *See also* Pa. R.C.P. 1028(a).

[115] *Smolsky v. Governor's Office of Admin.* 990 A.2d 173 (Pa.Cmwlth. 2010).

[116] Pa. R.C.P. 1704(c). Commonwealth Court permits class action to be utilized to obtain individual property tax rebates that had been denied by the Pennsylvania Department of Revenue. Holds that the criteria to obtain class action status were met by plaintiff. *Muscarella v. Commonwealth*, 39 A.3d 459 (Pa. Cmwlth. 2012).

[117] Pa. R.C.P. 1705.

a. Notice to class

The notice requirements in class action suits are described in Rule 23(c)(2). Notice requirements for class actions brought under 23(b)(1) and (2) are flexible and do not require individual notice while individual notice is required in Rule 23(b)(3) suits. Notice of opt-out rights is required in Rule 23(b)(3) cases. The court has discretion under Rule 23(d)(1)(B) to order notice at any time in any Rule 23 lawsuit for the protection of the class members or the fair conduct of the lawsuit.

Rule 23(c)(2)(A) provides that in class actions brought under Rule 23(b)(1) or (b)(2), "the court may direct appropriate notice to the class." Notice is not required either before or after certification, or, indeed, at all.[118] Because there is no right to opt out of a Rule 23(b)(1) or 23(b)(2) class, the need for notice is diminished and should be "exercised with care."[119] Unlike suits brought under Rule 23(b)(3), if notice is required, it need not be individual.[120] This flexible approach acknowledges that the cost of notice may "prove crippling and the benefits may be relatively small."[121]

b. Burden to show class certification

The burden of showing each of the elements of class certification is initially on the moving party.[122]

---

[118] *Sosna v. Iowa*, 419 U.S. 393, 397 n.4 (1975); *In re Integra Realty Resources Inc.*, 262 F.3d 1089, 1109 (10th Cir. 2001) (whether notice is required within discretion of court).
[119] Fed. R. Civ. P. 23(c)(2) advisory committee's notes
[120] *Sims v. Bank of Am. Corp.*, 2008 U.S. Dist. LEXIS 11972, at *26-28, 2008 WL 479988, at *9 (E.D.N.Y. Feb. 19, 2008); *Meachem v. Wing*, 227 F.R.D. 232, 235 (S.D.N.Y. 2005).
[121] Federal Judicial Center, Manual for Complex Litigation (Fourth) § 21.311 (2004); Fed. R. Civ. P. 23(c)(2) advisory committee's notes.
[122] *Stirman v. Exxon Corporation*, 280 F.3d 554, 562 (5th Cir. 2002).

2. Class Actions in Pennsylvania State Court

Ordinarily, a court may not address questions of certification until the pleading stage is completed and attacks on the complaint or demurrers to the substance of the claim have already been ruled upon.[123]

In *Baldassari v. Suburban Cable TV Co. Inc.*,[124] the Superior Court stated that, in a class certification hearing, the court's authority is confined to a consideration of the class action allegations, not the merits of the controversy. This is similar to federal procedure, where the legal merits of the controversy would be addressed prior to responsive pleadings in a Rule 12 motion.[125]

When the court certifies a class action, it must state in its order that every member of the court-defined class is a member unless the member specifically requests to opt out by a specified date.[126] This rule is not absolute because there will be circumstances in which a party may not remove himself. In certain limited circumstances where the court finds the individual claims will be extensive, the court may provide in its order that no person may be a member of the class unless he or she opts into the class.[127]

a. Notice to class

Pennsylvania Rule 1712 requires notice in all class actions. The Pennsylvania rule provides that in certain circumstances, individual notice is not required. The Pennsylvania rule says general notice may suffice if it is reasonably calculated to inform members of

---

[123] *Sears v. Corbett*, 49 A.3d 463 (Pa. 2012) ("a court cannot make a class action determination until the close of pleadings"); *Niemic v. Allstate Ins. Co.*, 721 A.2d 807, 810 (Pa. Super. Ct. 1988) ("upon a motion for class action certification the court considers whether a claim may be brought by a class of plaintiffs, whereas at the earlier, preliminary stage, the court must decide whether there exists a valid claim to be brought at all, no matter who the plaintiff").

[124] 808 A.2d 184 (Pa. Super Ct. 2002)(citing the Explanatory Note to Pennsylvania Rule 1707).

[125] Fed. R. Civ. P. 12.

[126] Pa. R.C.P. 1711(a), (b)(1), (2); *Egenrieder v. Ohio Cas. Group*, 529 A.2d 1118 (Pa. Super. Ct. 1987)(Parties certified as parties to the action may appeal on behalf of those who were excluded from the certification).

[127] Pa. R. Civ. P. 1711(b).

the pendency of the action, such as through newspapers, television, radio, or certain interest groups. Further, the Pennsylvania rule allocates to the plaintiff the expense of providing notice, though the defendant may be required to cooperate in order to minimize expense.[128] The federal rules are silent as to cost allocation.

To be effective and binding, the notice provided to a class must pass constitutional requirements. In *Wilkes v. Phoenix Home Life Mut. Ins. Co.,*[129] insureds and trustees of an insurance trust brought an action against a life insurance company to recover for misrepresentation, unfair trade practices, and breach of contract. The insurance company claimed that the res judicata effect of an out-of-state class settlement in which plaintiffs were notified of their class membership barred the suit. The Pennsylvania Supreme Court, in reversing a lower court determination that genuine factual issues as to the adequacy of the notice precluded summary judgment on the res judicata question, undertook a broad collateral review and found the notice constitutionally adequate.[130] While acknowledging that inadequate notice is an exception to both res judicata doctrine and the grant of full faith and credit to out-of-state judgments, the court held that the information provided in the notice adequately warned the plaintiffs that they were included in the earlier class action litigation.[131]

In *Tesauro v. The Quigley Corp.*, the plaintiff's proposal that notice be posted on the defendant's website was denied because potential prejudice to the defendant

[128] Pa. R. Civ. P. 1712.
[129] 902 A.2d 366 (Pa. 2006)
[130] *Id.* at 382-84.
[131] *Id.*

outweighed plaintiff's desire to minimize expense of sending notice through the defendant's established methods of communication as provided in Rule 1712(c).[132]

b. Burden to show class certification

The burden of showing each of the elements of class certification is initially on the moving party.[133] This burden "is not heavy and is thus consistent with the policy that decisions in favor of maintaining a class action should be liberally made."[134] The moving party must present evidence sufficient to make out a prima facie case from which the court can conclude that the class certification requirements are met.[135] Where evidence conflicts, doubt should be resolved in favor of class certification.[136] "The prima facie burden of proof standard at the class certification stage is met by a qualitative 'substantial evidence' test."[137] "Courts have consistently interpreted the phrase 'substantial evidence' to mean 'more than a mere scintilla,' but evidence 'which a reasonable mind might accept as adequate to support a conclusion.'"[138]

The courts in Pennsylvania have stressed that, in deciding a motion for class certification, the merits of the underlying case should not be considered; the hearing is confined to a consideration of the class action allegations and is not concerned with the merits of the controversy or with attacks on the other averments of the complaint.[139] Its only purpose is to decide whether the action shall continue as a class action or as an action with individual parties only; it is designed to decide who shall be the parties to the

[132] *Tesauro v. The Quigley Corporation*, 2002 WL 372947 (C.P. Phila. Jan. 25, 2002).
[133] *Cambanis v. Nationwide Ins. Co.*, 501 A.2d 635 (Pa. Super. Ct. 1985).
[134] *Id.* at 637.
[135] *Debbs v. Chrysler Corp.*, 810 A.2d 137. 153-54 (Pa. Super. Ct. 2002).
[136] *Lewis v. Bayer AG*, 2004 WL 1146692, *7 (C.P. Phila. Mar. 19, 2004).
[137] *Id.*
[138] *Crepeau v. Rite Aid, Inc.*, 2005 WL 1041395, *3 (C.P. Phila. May 3, 2005)(*quoting SSEN, Inc. v. Borough of Eddystone*, 810 A. 2d 200, 207 (Pa. Commw. Ct. 2002)).
[139] *Baldassari v. Suburban Cable TV Co.*, 808 A.2d 184 (Pa. Super. Ct. 2002)

action and nothing more.[140] The merits of the action and the right of the plaintiff to recover are to be excluded from consideration.[141] However, "courts may need to examine the elements of the underlying cause of action in order to dispose of class issues properly."[142]

J. Conducting the Class Action

1. Federal Class Actions

Rule 23(d) gives the court authority to issue orders that determine the course of proceedings or prescribe measures to prevent undue repetition or complication during the presentation of evidence and argument,[143] require additional notices to class members during the proceedings,[144] impose conditions on representative parties or intervenors,[145] require pleadings be amended to eliminate allegations about representation of absent persons,[146] or deal with similar procedural matters.[147]

2. Class Actions in Pennsylvania State Court

With one exception, Rule 1713 copies Federal Rule 23(d). It omits the Federal provision for an order amending the pleadings. This is unnecessary, since Rule 1033 regulating amendment of the pleadings is already incorporated by reference by Rule 1701(b). In addition to administrative and procedural matters, the court may require

---

[140] *Id*.

[141] *Id.* at 189-90 (quoting Pa.R.C.P. 1707, Explanatory Comment). *Accord, Cavanaugh v. Allegheny Ludlum Steel Corp.*, 528 A.2d 236 (Pa. Super Ct. 1987); *Braun v. Wal-Mart Stores, Inc.*, 78 Pa. D. & C. 4th 359 (C.P. Phila. 2005) (credibility may not be the focus of a certification decision, and it would not be proper to deny certification even if court concluded that the plaintiffs had not proven their case to the satisfaction of the court sitting as if conducting a non-jury trial).

[142] *Debbs v. Chrysler Corp.*, 810 A.2d at 154.

[143] Fed. R. Civ. P. 23(d)(1)(A).

[144] Fed. R. Civ. P. 23(d)(1)(B).

[145] Fed. R. Civ. P. 23(d)(1)(C).

[146] Fed. R. Civ. P. 23(d)(1)(D).

[147] Fed. R. Civ. P. 23(d)(1)(E).

additional notices to some or all of the members of (1) steps in the action, or (2) the proposed extent of the judgment, or (3) an opportunity to signify whether they consider the representation fair and adequate.[148] The court may also permit intervention. As to these interlocutory notices the rule specifically provides, as does Federal Rule 23(d), that the notice need be given only to some and not to all members of the class.[149]

K. Resolution: Settlement, Voluntary Dismissal, or Compromise in a Class Action

1. Federal Class Actions

Rule 23(e) requires that parties obtain court approval for voluntary dismissal or compromise and that proposals to settle the case be sent to the entire class for approval. Because class actions are vulnerable to conflicts of interest for the attorneys representing the class or the class representatives (i.e. their interests versus the interest of the class), the rule imposes obligations on the court and the parties seeking to settle the case. The rule requires court approval of resolutions only when the class has been certified.[150]

Attorney's fees are allowed under Rule 23.[151] However the actual mechanism for awarding of fees is not addressed in the Rules. Instead, the amount of attorney's fees are addressed under the Class Action Fairness Act.[152]

2. Class Actions in Pennsylvania State Court

[148] Pa. R. Civ. P. 1713.
[149] *Id*. at (a)(2).
[150] Fed. R. Civ. P. 23(e)(1)(A).
[151] Fed. R. Civ. P. 23(h).
[152] 28 U.S.C. § 1712 (limiting fee awards in coupon settlements).

Pennsylvania Rule 1714 provides in subsection (a) that no class action shall be compromised, settled, or discontinued without the approval of the court after hearing. It provides that prior to certification the representative party may discontinue the action with court approval without notice to the members of the class if the court finds that the discontinuance will not prejudice the members of the class.

Pennsylvania law requires that a class action may not be settled without a hearing and court approval.[153] Class action settlements are not required to benefit all class members equally.[154] The applicable standard for approving a class action settlement is the analysis established by the Pennsylvania Supreme Court in *Dauphin Deposit Bank and Trust Co. v. Hess*.[155] Seven factors are considered to determine whether a class action settlement should be approved:

(1) the risks of establishing liability and damages;

(2) the range of reasonableness of the settlement in light of the best possible recovery;

(3) the range of reasonableness of the settlement in light of all the attendant risks of litigation;

(4) the complexity, expense, and likely duration of the litigation;

(5) the state of the proceedings and the amount of discovery completed;

(6) the recommendations of competent counsel; and

(7) the reaction of the class to the settlement.[156]

[153] Pa. R. Civ. P. 1714(a).
[154] *Gregg v. Independence Blue Cross*, 2004 WL 869063, *47 (Pa. Com. Pl. Apr. 22, 2004).
[155] 727 A.2d 1076, 1079-80 (Pa. 1999).
[156] *Id.* at 1079-80.

Pennsylvania Rule 1714(b) allows that a class action may be discontinued without notice, prior to certification, if the court finds that the discontinuance will not prejudice the members of the class. Such discontinuance must be preceded by a hearing and factual findings that discontinuance prior to certification would not prejudice members of the class.[157]

Pennsylvania Rule 1714(d) provides that courts may approve class action settlements that do not create residual funds. Pennsylvania Rule 1716 addresses residual funds in class actions. Pennsylvania Rule 1716(a) provides that any order entering a judgment or approving the settlement or compromise of a class action must provide for the disbursement of residual funds. Pennsylvania Rule 1716(b) states that "not less than fifty percent (50%) of residual funds in a given class action shall be disbursed to the Pennsylvania Interest on Lawyers Trust Account Board." Further, the remaining funds may be disbursed "to the Pennsylvania Interest on Lawyers Trust Account Board, or to another entity for purposes that have a direct or indirect relationship to the objectives of the underlying class action, or which otherwise promote the substantive or procedural interests of the members of the class."[158]

Pennsylvania Rule 1717 provides the criteria to be applied by the court in determining the amount of attorneys' fees. The non-exclusive list of factors in the Pennsylvania Rule includes the time and effort reasonably expended, the quality of the services, the results achieved and benefits conferred upon the class or the public, the magnitude, complexity, and uniqueness of the litigation, and whether the receipt of a fee was contingent on success.

---

[157] *Silver Spring Tp. v. Pennsy Supply, Inc.*, 613 A.2d 108 (Pa. Commw. Ct. 1992).
[158] Pa.R.C.P. 1716(b).

Pennsylvania Courts are "permitted to award a reasonable fee pursuant to a lodestar, a percentage of the common fund, or, if necessary, a hybrid approach."[159] A court may apply a "contingency enhancement, *i.e.*, a multiplier," to the lodestar calculation but "only if the lodestar does not reflect counsel's contingent risk."[160]

A settlement in a class action lawsuit is entitled to the initial presumption that it is fair.[161] The factors required to establish this presumption are:

(1) That the settlement has been arrived at by arm's-length bargaining;

(2) That sufficient discovery has been taken or investigation completed to enable counsel and the court to act intelligently;

(3) That the proponents of the settlement are counsel experienced in similar litigation; and

(4) That the number of objectors or interests they represent is not large when compared to the class as a whole.[162]

In the absence of a binding Pennsylvania rule or case law, the *Milkman* court adopted the procedure used for proposed settlement in federal class action suits.[163]

An order disapproving a class settlement is immediately appealable under the "collateral order" doctrine.[164] However, an order granting preliminary approval of a class

[159] *Braun v. Wal-Mart Stores, Inc.*, 24 A.3d 875, 979 (Pa. Super. Ct. 2011), *aff'd on other grounds*, 106 A.3d 656 (Pa. 2015), *petitions for cert. docketed*, (U.S. Mar. 17, 2015) (Nos. 14-1123, 14-1124).
[160] *Id*. (reversing trial court's award of 3.7 multiplier on lodestar amount based on finding that hourly rates of plaintiffs' attorneys reflected contingency risk and remanding for re-calculation of fees).
[161] *Gregg v. Independence Blue Cross*, 2004 WL 869063, *31 (C.P. Phila. Apr. 22, 2004).
[162] *Milkman v. American Travelers Life Insurance Co.*, 2002 WL 778272, *5 (C.P. Phila. Apr. 1, 2002) (citing Herbert B. Newberg and Alba Conte, 2 Newberg on Class Actions § 11.41 (3d ed. 1992)).
[163] *Milkman v. American Travelers Life Insurance Company*, 2001 WL 1807376 (C.P. Phila. Nov. 26, 2001) (adopting two-step process for approval of class action settlements set forth in Manual for Complex Litigation, Third, § 30.41 at 237).
[164] *See, e.g., Treasurer of State of Conn. V. Ballard Spahr Andrews & Ingersoll LLP*, 866 A.2d 479, 483-84 (Pa. Commw. Ct. 2005); *Buchanan v. Century Fed. Sav's & Loan Ass'n*, 393 A.2d 704 (Pa. Super Ct. 1978).

settlement but imposing certain conditions in order to obtain final approval is not appealable under the collateral order doctrine.[165]

IV. Conclusion

Although class actions in Pennsylvania state courts and federal court are quite similar, there are some specific differences that can impact selection. Generally speaking, it is easier to initiate a class action in Pennsylvania state court, but it is also more difficult to conclude the action. If an attorney anticipates the case going to final verdict, procedural issues such as rules of evidence may dominate the determination of where to file the case. However, it is easier to conclude negotiated settlements of cases at the pre-certification stage in federal court. Only the Pennsylvania rules require court approval of pre-certification settlements. The certification scheme of Pennsylvania rules 1702 (prerequisites) and 1708 (determination of fair and efficient method of adjudication) creates a framework that can include more class actions than the federal rules. Add to this the ability in federal court for ability to get claims dismissed through Rule 12 motions. Bringing class actions in federal court is decidedly more difficult.

[165] *Brophy v. Philadelphia Gas Works*, 921 A.2d 80 (Pa. Commw. Ct. 2007).